

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 14, 2009 Session

RHONDA GAIL OAKES, v. HARVEY JOE OAKES

Direct Appeal from the General Sessions Court for Bledsoe County
No. 1468 Hon. Jon Kerry Blackwood, Judge

No. E2007-02586-COA-R3-CV - FILED JUNE 8, 2009

This is an appeal from the ruling of the Trial Court, following the appeal to this Court, wherein we remanded with enforcement of the Trial Court's Judgment, as modified. After remand, the wife moved for contempt against the husband for not paying as ordered, and at a hearing on that motion the Trial Court found the husband guilty of contempt and ordered him to serve ten days in confinement for each finding of contempt. The order provided that the sentence would be suspended if he paid the sum due. The husband paid the sum due and appealed. On appeal, we affirm the Judgment of the Trial Court.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the General Sessions Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., J., and JOHN W. MCCLARTY, J., joined.

Robin Ruben Flores, Chattanooga, Tennessee, for appellant, Harvey Joe Oakes.

Cindy A. Howell, Sparta, Tennessee, for appellee, Rhonda Gail Oakes.

OPINION

The parties in this case were divorced in the Trial Court on February, 6, 2006. The husband appealed from the divorce decree to this Court, and on appeal, we reversed the Trial Court's award of one-half of husband's military disability benefits and attorney's fees to wife, but affirmed the division of the marital estate and classification of property. The award of alimony was modified to alimony *in futuro*, and such was affirmed. This Court held that it was appropriate to include the

husband's military disability benefits in the calculation of his monthly income for determination of alimony, and the cause was remanded to the Trial Court for enforcement of the Trial Court's Judgment, as modified, and for the collection of the costs assessed below. An appeal to the Supreme Court was denied. *See, Oakes v. Oakes*, 235 S. W. 3d 152, 154 (Tenn. Ct. App. 2000), perm. to appeal denied (Aug. 13, 2007).

On remand, the wife filed a Petition for Contempt on July 20, 2007 stating that the husband had failed to pay alimony as ordered and was in arrears in the amount of \$13,000.00 and he had failed to make a car payment in December 2006 as ordered.

The Trial Court conducted a hearing on August 2, 2007, where the husband appeared *pro se*, and the Trial Court recounted the events of the August 2, 2007 hearing in an order entered October 31, 2008 as follows:

Pursuant to a Petition for Contempt filed by plaintiff on July 20, 2007, the Court conducted a hearing on August 2, 2007. The defendant [Husband] appeared *pro se*. The Court determined that defendant [Husband] was in arrears in the sum of \$13,800 in alimony payments. The defendant stated in open court that he had the funds to pay said arrearage within fourteen (14) days. The Court ordered said sum to be paid within that time frame. An Order dated August 27, 2007 was entered to reflect that ruling.

The Trial Court entered a written order, dated August 27, 2007, that stated that a hearing on the petition for contempt filed by the wife had been heard on August 27, 2007.¹ The designation of the hearing date as August 27th instead of August 2nd is a clerical mistake as the parties agree that the hearing was held on August 2nd and the Court also referred to the hearing as August 2nd in its later order of October 31, 2008.

On August 30, 2007, the husband, through counsel, filed a Motion for the Trial Court to alter or amend its Final Decree of Divorce as modified by the Court of Appeals pursuant to Tenn. R. Civ. P. 60.02(5). The husband argued that the Court of Appeals had erred when it included the husband's disability pay he receives from the Department of Veteran's Affairs in its calculation of alimony, and sought a ruling by the Trial Court to reverse the alimony award made by the Court of Appeals. The wife responded that the Trial Court did not have the authority to modify or overrule a decision made by the Court of Appeals.

On September 13, 2007, the wife filed another petition for contempt and to alter or

¹ The husband and wife claim that this order is dated August 29th instead of August 27th as stated by the court in the 2008 order and that the referenced hearing is designated as taking place on August 27th. The dates were handwritten in the order and could be interpreted as either 27th or 29th. As the handwriting is that of the Judge, this Court will assume that the Judge can read his own handwriting and that the number is 27.

amend the order of August 27, 2007. She contended that more than fourteen days had passed since the August Order, when the Court had ordered the husband to pay the alimony arrearage he owed and he had not complied. A show cause order was issued by the Court to the husband on September 19, 2007, setting a hearing for October 19, 2007 on charges of “criminal contempt” against the husband.

A hearing was conducted on October 19, 2007 and the Court considered the wife’s petition for contempt and the husband’s motion to alter or amend. By order entered November 9, 2007 *nunc pro tunc* as October 19, 2007, the Court stated that at a hearing on August 2, 2007 the Court found that the husband was in contempt for failure to pay an alimony arrearage of \$13,800.00 and the husband stated that he could pay it within fourteen days. The Court found the husband had willfully failed to make the alimony payment and that he had also failed to make a car payment as previously ordered by the divorce decree. The Court found the husband guilty of contempt and ordered him to serve ten days for each finding of contempt. The order provided that the sentence would be suspended if the husband paid the sum of \$15,890.00, which represented the alimony arrearage and the car payment. The written order did not address the husband’s motions to alter or amend but the Trial Court, in its order of October 27, 2008, stated that although the written order only addressed the wife’s petition for contempt, he overruled defendant’s motion to alter or amend because the Trial Court had no authority to modify a judgment entered by the Court of Appeals.

The issues raised on appeal are:

- A. Whether the Trial Court erred when it found appellant in contempt of court?
- B. Whether the appellant can relitigate on appeal an issue that was previously decided by the Court of Appeals.
- C. Whether the Trial Court erred when it failed to award sanctions, costs and attorney’s fees based on the frivolous nature of appellant’s pleadings?
- D. Whether the appeal is frivolous?

Our review of a trial court's findings of fact is *de novo* with a presumption of the correctness of the findings of fact unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d). Issues of law are reviewed *de novo* with no presumption of correctness. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn.1999). Our review of a trial court's decision regarding the award of attorney's fees utilizes the abuse of discretion standard of review. *In re Estate of Greenamyre*, 219 S.W.3d 877, 885-886 (Tenn. Ct. App. 2005).

The husband acknowledged that the order of August 2, 2007 ordered him to pay \$13,800.00 in alimony arrearage within fourteen days of the hearing. He contends, however, that the oral order rendered at the hearing was never reduced to a written order and was of no effect. He further reasons that he could not have been in contempt of court and the Trial Court was in error

finding him in contempt at the October 19, 2007 hearing on the wife's second Petition for contempt. The husband seeks to recover the amount paid to her by defendant in the amount of \$15,890.00, and to support this argument, the husband relies on the rule that a court speaks only through its written judgments, duly entered upon its minutes. The husband's argument is without merit, in that in this case, a written order finding the husband was in arrears for \$13,800.00 and ordering him to pay that amount within fourteen days of the written order was issued on August 27, 2007. The fact that the Trial Court's order of contempt issued *nunc pro tunc* as October 19, 2007 and entered November 9, 2007 did not specifically reference the August 27, 2007 written order is of no consequence as the specific findings of the August 27, 2007 order, that the husband's arrearage was \$13,800.00 and he was to pay it within fourteen days, are referenced in the order of contempt. In the order issued from the Court of Appeals on June 5, 2008, the Trial Court was instructed to render a decision on the issue and the clerk was to supplement the record with such documents as determined by the Trial Court. Accordingly, the written order dated August 27, 2007 required the husband to pay the arrearage of \$13,800.00 within fourteen days of the order. Consequently the order of contempt of October 19, 2007 was within the authority of the Trial Court and was not error.

Moreover, the wife argued on appeal that because the husband purged his contempt by paying the amount order by the Judge, the contempt issue raised on appeal by the husband is moot. *Citing, State of Tenn., Dept. of Human Serv., ex rel. Davis v. Jenkins*, 1989 WL 124950 (Tenn. Ct. App. Sept. 13, 1989). While the reasoning in *Davis* that the contempt was purged before the entry of judgment is not applicable, it is also well settled that civil contempt can be purged by obedience to the court's order, and while the Trial Judge denominated the contempt as "criminal", his order establishes that he intended a civil contempt, and his judgment falls within the ambit of civil contempt. Since civil contempt can be purged by obedience to the Court's order which provided that the sentence would be suspended if the husband paid the sum of \$15,890.00, and the record indicated he paid the sum on that date, this issue is without merit.

Under the law of the case doctrine "an appellate court's decision on an issue of law is binding in later trials and appeals of the same case if the facts on the second trial or appeal are substantially the same as the facts in the first trial or appeal." *Watson's Carpet and Floor Covering, Inc. v. McCormick*, 247 S.W.3d 169, 180 (Tenn. Ct. App. 2007). The exceptions to the law of the case doctrine are limited and a reconsideration of an issue is permitted only if: (1) the evidence produced on remand is substantially different than the evidence produced at the initial proceeding; (2) the earlier findings of law are "clearly erroneous and would result in manifest injustice if allowed to stand"; (3) the prior ruling is "contrary to a change in controlling law that occurred between the first and second appeal." *Id.* at 181.

None of the exceptions to the doctrine is applicable to this case, and under the doctrine of the law of the case, the Trial Court did not err when it found that it did not have authority to amend the holding of the first appeal of *Oakes*, and accordingly, we do not consider the merits of the issue raised by the husband.

The wife contends the Trial Court should have sanctioned the husband as his

pleadings filed in the Trial Court were frivolous and without merit and filed for the purpose of delay and to cause her added expenses, relying on Tenn. R. Civ. P. 11.02. There is no evidence that the issue of Rule 11 sanctions was ever raised with the Trial Court by the wife, and as the issue was never raised at the trial level, she may not raise it on appeal. *Lawrence v. Stanford*, 655 S.W.2d 927 (Tenn.1983). Although the wife included a plea for attorney's fees and costs in her petition for contempt filed on September 26, 2007 she does not raise the issue of the Trial Court's failure to award her fees and costs on appeal.

The wife further contends that she is entitled to attorney's fees and costs associated with this appeal because the appeal is frivolous pursuant to Tenn. Code Ann. § 27-1-122. While the issue of alimony raised by the husband was without merit and did not have a reasonable chance of success, the other issues raised renders this appeal not completely frivolous, and we decline to award the wife fees and costs associated with the appeal.

For the foregoing reasons, we affirm the Judgment of the Trial Court and remand, with the cost of the appeal assessed to Harvey Joe Oakes.

HERSCHEL PICKENS FRANKS, P.J.